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No. 95-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,
Petitioners,

v.

CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. Two responses have been filed in this case,[1] which are quite different in approach. The only "opposition" brief denominated as such was filed by the City of Cincinnati. That brief, which devotes its entire attention to arguing the merits of the case, never addresses the question of whether the petition should be held pending the Court's resolution of *Romer v. Evans*, No. 94-1039. Since the first issue discussed by the City is the very same "fundamental constitutional right to participate equally in the political process" that is the central focus of the *Romer* case, the City's suggestion that the petition should be denied outright is manifestly incorrect.[2]

In contrast, although petitioners and ERNSR respondents disagree about many things, they do agree on one, which is most important for the Court's purposes here: that the petition in this case should not simply be denied, but should *at least* be held pending the Court's resolution of *Romer*. Indeed, there is no sound argument to the contrary.

2. The only real issue as to the proper disposition of the petition at this point, therefore, is whether the Court should hold this petition or go ahead and grant *certiorari* now on the questions presented by petitioners, including the second question, which is whether the category of unusual structural

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[1] The briefs filed by the two sets of respondents will be identified, respectively, as "ERNSR Resp." (Equal Rights, Not Special Rights) and "City Opp." (City of Cincinnati).

[2] The City also devotes attention in its opposition to the issue of whether gay men, lesbians, and bisexuals constitute a "suspect class" or a "quasi-suspect class." This issue is not properly before the Court -- it was not raised by petitioners, no cross-petition has been filed, and, in any event, respondents prevailed below on this point and therefore have no grounds to raise it here.

measures that includes Issue 3 can survive rational basis review. Petitioners have noted already that this case affords an appropriate vehicle for resolving this issue, since it was fully addressed on the merits by both of the courts below. Although the rational basis question was briefed by the parties in *Romer* and is properly before the Court in that case, the issue was not reached by the Colorado Supreme Court. Thus the Court may find that this case will assist significantly in its resolution of the rational basis question.[3]

3. Leaving those matters aside, therefore, petitioners will devote the bulk of this reply to a number of disagreements with and possible misunderstandings that are raised by respondents' presentations. Petitioners believe this discussion will assist the Court in reaching a proper disposition of the petition in this case, regardless of whether the Court makes that determination before or after *Romer* is decided.

4. In the event that the Court holds the petition and decides in *Romer* that this category of unusual structural measures -- which includes Colorado's Amendment 2, Cincinnati's Issue 3, and the Akron city charter amendment struck down by the Court in *Hunter v. Erickson*, 393 U.S. 385 (1969) -- violates the Equal Protection Clause, ERNSR respondents attempt to sidestep the necessary consequence that Issue 3 would be invalidated. ERNSR Resp. 14-17. Their argument seems to be that Issue 3, unlike Amendment

[3] Petitioners recognize that one consideration here is that if respondents prevail on the fundamental rights issue in *Romer*, then disposition of the further question of rational basis review will be entirely obviated in both cases. This point is discussed further in Part 4, *infra*. If the Court does decide to hold this petition pending its decision in *Romer*, and if petitioners prevail in *Romer*, then the Court should grant review on the rational basis question in this case for the reasons set forth in Part 6, *infra*.

2, is not a statewide measure, but "affects only *local* communities." *Id.* at 16 (emphasis in original).

Petitioners believe that this argument is simply wrong. In addressing the question whether individual citizens have a fundamental right to participate in the political process on an equal basis with one another, no legitimate distinction can be drawn between state and local governments for purposes of the Federal Constitution. On the contrary, the powers exercised by municipal governments are universally those delegated or authorized in the text of state constitutions and state laws. *See, e.g.*, Ohio Const. art. XVIII (governing municipal corporations and authorizing municipal home rule). If it is unconstitutional for the State to take some action, it cannot be constitutional for a City, acting upon authority conferred by the State, to do the very same thing. Therefore, whether action is taken at the state or the local level, government "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393.

Moreover, the line of cases in which the Court has addressed this category of unusual structural measures demonstrates the same point. The landmark case in this line -- *Hunter* -- involved an Akron city charter amendment that clearly has been the model for this next generation of such measures, including Amendment 2 and Issue 3. Indeed, for all practical purposes, Issue 3 is virtually identical to the city charter amendment invalidated in *Hunter*, except that here a different group of citizens has been singled out and relegated to exercising only second-class political rights. The Court invalidated this same kind of structural measure in *Hunter* because it targeted and subordinated a specified group of citizens "by making it more difficult to enact legislation in its

behalf." *Hunter*, 393 U.S. at 393. As Justice Harlan restated the matter in his concurrence, this measure explicitly serves to "place special burdens" on the ability of a defined group of citizens "to achieve beneficial legislation," and therefore "is discriminatory on its face." *Id.* at 395 (Harlan, J., concurring).[4]

5. Respondents also mischaracterize petitioners' argument on the *Romer* issue in two important respects that must be addressed here. *First*, ERNSR respondents make the erroneous claim that petitioners' argument is designed to curtail the use of the initiative or referendum process, and to insist that most if not all legislative decisions must be made by elected representatives rather than by the electorate at large. The argument is thus portrayed as being directly incompatible with the historical principles of our democracy. ERNSR Resp. 11-14.

To the contrary, petitioners' argument reinforces those historical principles. The constitutional flaw with the category of unusual structural measures exemplified by Issue 3 is not that they are adopted through the mechanisms of direct democracy, but that they create first and second tiers of political access. Respondents would have it that as long

[4] ERNSR respondents place special reliance on *James v. Valtierra*, 402 U.S. 137 (1971), which they contend rested on a narrow reading of *Hunter*. Notably, however, they *do not even mention Gordon v. Lance*, 403 U.S. 1 (1971), decided six weeks after *James*, in which the Court clarified that it did not regard *Hunter* exclusively as a race-based, suspect classification case. In *Gordon*, which had nothing to do with racial classifications, the Court described the operative constitutional inquiry as whether the challenged measure disadvantages an "identifiable group" of citizens such that a defined "sector of the population may be said to have been 'fenced out' of the political process." *Id.* at 5.

as these punitive measures do not classify by race or prevent the counting of everyone's votes, they do not implicate the Federal Constitution in any way. The decisive riposte to this thrust was provided by Solicitor General Griswold in the United States' brief as *amicus curiae* in *Hunter*:

> The Equal Protection Clause forbids a state or municipality from arbitrarily excluding voters from the booth . . . , weighting their votes unequally . . . , and giving greater representation to one class of voters than to another . . . . The same principles which forbid these and other forms of imbalance in the electoral processes apply, *a fortiori*, when what is at stake is the end product to which these are preliminary and preparatory steps -- *i.e.*, the very enactment of legislation.

Id. at 15. Although these unusual structural measures have historically been effected by voter initiative, petitioners' argument does not turn on their method of adoption. In any event, the Court settled long ago that even actions taken by the people directly through the initiative process are invalid when they contradict the overarching provisions of the United States Constitution. *See, e.g., Hawke v. Smith*, 253 U.S. 221 (1920) (invalidating Ohio initiative proposal); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating voter-initiated state constitutional amendment); *Hunter, supra*.

Second, ERNSR respondents contend that Issue 3 is valid because state and local governments must remain "entirely free to repeal such civil rights protections." ERNSR Resp. 14. But the actual effect of Issue 3 -- which is to restructure the political process so that members of a targeted group of citizens must operate under a more burdensome set of political rules than all others -- is dramatically different from a mere repeal of specific legislation. The Court has clearly

and persistently held to this difference in distinguishing the *Hunter* line of cases. *See Crawford v. Board of Education of Los Angeles*, 458 U.S. 527, 538 (1982) ("In *Reitman* . . . and again in *Hunter* . . . we were careful to note that the laws under review *did more than* 'merely repeal' existing anti-discrimination legislation." (emphasis added)). By contrast to a simple attempt to repeal any existing laws, Issue 3 singles out a defined group of citizens that are then "fenced out" of the political process and disabled from participating on equal terms with other citizens in that process. *Gordon*, 403 U.S. at 5. As a result, the "right to discriminate" is enshrined as "one of the basic policies" of the City, which explicitly reduces the targeted group to a subordinate political caste. *Reitman*, 387 U.S. at 381.

Indeed, the Cincinnati City Council has now voted to repeal the provisions of the Human Rights Ordinance that had forbidden discrimination on the basis of sexual orientation. Municipal voters could have done that as well. What cannot be done, however, is to target members of a defined group of citizens and restructure the governmental and political processes so as to institutionalize their subordination.

6. Finally, respondents contend that the Court should not grant *certiorari* on the issue of rational basis review either before or after it decides the *Romer* case. Only a few of their points will be addressed here. As an initial matter, ERNSR respondents assert that the Colorado Supreme Court "found that Amendment 2 serves compelling (and therefore necessarily legitimate) governmental interests in protecting religious liberty and associational privacy." ERNSR Resp. 18 (citing *Evans v. Romer*, 882 P.2d 1335, 1342-44 (1994)). That is not correct. Although the Colorado Supreme Court did determine that these were legitimate interests, it never held that there was any rational connection between these interests and the selective classification of gay people

embodied in Amendment 2 and mirrored in Issue 3. Instead, that court held that such measures must be invalidated *precisely* because the appropriate link was lacking between the actual workings of these measures and the government interests that they are purported to advance.[5]

This is a critical piece of petitioners' argument. The issue here for purposes of rational basis review is *not* whether respondents have identified any government interests that, in the abstract, are legitimate or even compelling interests. The crucial issue instead is whether respondents have shown, or the Courts can find, that those asserted interests are rationally related to the limitations that Issue 3 imposes uniquely upon the political access of lesbian, gay and bisexual citizens in the City's political processes.[6]

Proper framing of this issue is extremely important also in light of the two most significant precedents on rational basis review that were emphasized in the petition. *See* Pet.

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[5] In *Romer*, the Colorado Supreme Court found that fundamental constitutional rights were at stake, and therefore applied the searching test of whether the link between the challenged measure and the asserted government interests satisfied a requirement of "narrow tailoring." *See Romer*, 882 P.2d at 1342-44. The court did not decide whether such measures actually *rationally further* the same interests.

[6] Respondents also err in contending that Issue 3 can be justified as a collective expression of disapproval of "homosexual conduct." ERNSR Resp. 23; City Opp. 26-27. The text of the measure itself targets persons based on their sexual orientation. In addition, the District Court found as a fact that lesbian, gay and bisexual citizens constitute "an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic." App. 39a. The court below did not overturn this finding.

19-26 (discussing, *inter alia*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973)). Respondents' position that the ruling below is not inconsistent with any of the Court's prior decisions is rendered unpersuasive by the remarkable fact that neither set of respondents even discusses these two cases in the context of the rational basis question. Where, as here, a challenged measure reflects a "bare . . . desire to harm a politically unpopular group," *Moreno*, 413 U.S. at 534, it cannot stand under the Equal Protection Clause. Further, even absent such antipathy, the mere articulation of potentially legitimate government interests does not end the inquiry. Instead, a further examination must be made of whether the link between these asserted interests and any distinction actually drawn by the measure is not "so attenuated as to render the distinction arbitrary and irrational." *Cleburne*, 473 U.S. at 446. The court below misapplied this Court's precedents on rational basis review when it failed to undertake this essential examination.[7]

Rather than discussing these cases, ERNSR respondents press an irrelevant argument about the relationship of

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[7] ERNSR respondents also maintain that the Court does not undertake to evaluate the subjective motivations of the proponents of a challenged law, and that the District Court could not and did not do so here. ERNSR Resp. 20-21. Once again, however, this discussion is beside the point. Issue 3 is "discriminatory on its face." *See Hunter*, 393 U.S. at 395 (Harlan, J., concurring). Further, the District Court held that the actual effect of Issue 3 is simply to give effect to "private biases." *Cleburne*, 473 U.S. at 448. This conclusion was properly informed by the court's examination of the "historical context and conditions existing prior to [the] enactment" of Issue 3. *See Reitman* at 373; Pet. App. 40a n.7.

"underinclusiveness" to rational basis review. ERNSR Resp. 22-23. Once again, however, that is simply not the argument petitioners make when they criticize the extreme generality of most of the government interests asserted by respondents. The argument instead is over whether Issue 3's singling out of lesbians, gay men and bisexuals *rationally furthers* those asserted government interests. Suppose, for example, the City of Cincinnati were to adopt a law allegedly designed to reduce government regulation and generate cost savings -- two of the very general interests put forward by respondents in this case -- by curtailing city services to Appalachian citizens. The central question posed for rational basis review would be *not* whether these interests are legitimate government interests, and *not* whether there is at least some putative connection between them and the law, but whether there is any "reason to infer antipathy" from the law's classification, which would show that it had an illegitimate purpose. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979), quoted in *FCC v. Beach Communications, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 2096, 2101 (1993). If not, the second question -- also ignored by respondents -- is whether the law's particular restriction on Appalachian citizens rationally furthers those interests. In the same manner, the adoption of Issue 3 squarely prompts the question whether the structural subordination of only gay, lesbian, and bisexual citizens in the City's political processes, which is the clear and intended consequence of the measure, *rationally furthers* any legitimate government interest. "Underinclusiveness" is entirely irrelevant to that analysis.

Petitioners therefore agree with the District Court that Issue 3 gives effect to private prejudice and does not rationally further any legitimate government interest. This rational basis question is worthy of review even if the Court were to determine that unusual structural measures, such as Amendment 2 and Issue 3, do not infringe on a fundamental

right to participate in the political process on an equal basis with other citizens. A quarter-century ago, the Court faced the same kind of measure in *Hunter*. That city charter amendment, like this one, was specifically designed to "stack the deck" against certain defined groups in the political process. The Court's ringing rejection of that approach closed the door on attempts to structure political castes for a generation. Now the same kinds of pressures and responses have surged to the surface in our society, and the Court is again called to decide whether such extraordinary restructuring of the political process is compatible with individual rights protected by the Equal Protection Clause. Petitioners strongly urge the Court not to uphold such measures, and to examine and reject them under rational basis review in this case even if the Court does not reject them under the equal political participation argument that is at issue both here and in *Romer*.

CONCLUSION

For these reasons, as well as those stated in the petition, a writ of *certiorari* should be granted here. In the alternative, this case should be held pending the Court's resolution of *Romer v. Evans*, No. 94-1039.

Respectfully submitted,

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